

# 150 YEARS QUEENSLAND

## 150 YEARS OF UNLAWFUL OCCUPATION?

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*When the Australian continent was settled by Europeans, an acquisition of land began that caused repercussions evident to this very day. Indigenous people were forced to abandon their traditional lands and today the question remains as to who should be deemed the proper rights-bearer of property rights to those lands at the time of first contact and today. To discuss these questions, the article will proceed in three steps. In a first step, property rights will be classified according to the origins of what it is that is doing the moral work to justify claim rights to property. It will be argued that what is probably the most well-known class of property rights theories, namely historic entitlement theories, is theoretically instable. It is therefore suggested to prefer another class of theories basing property rights on interests. These two theories will then be used to show that the view of the early settlers of the Australian continent as terra nullius is not supported by either of those theories, claiming that Indigenous people at the time of first contact have to be considered the proprietors of the land. In a further step it will be discussed whether those past entitlements can be used to justify current claim rights to land.*

When the Australian continent was settled by Europeans, reaching Queensland with the expedition of John Oxley in 1823, an appropriation of land began that caused repercussions to this very day. Land that was previously used by nomadic Indigenous tribes was gradually turned into private property, and land that was not divided up between individual white settlers became Crown land belonging to the state. In this way the original Aboriginal users were little by little excluded from both the use of the lands they inhabited and all future revenues derived from them. Today the question of importance in respect to those lands is what should be done about Aboriginal land claims, i.e., claims of ownership by Indigenous people today over lands their forbears used to inhabit. A general commonsense approach seems to suggest that this question is quite easy to settle. The presumption is that (1) the land used to be owned by Aboriginal people before the advent of white settlement, (2) the white settlers unlawfully took the land from the Aboriginal people, and (3) what has unlawfully been taken has to be returned or, should that not be possible, some other form of redress has to be made. Given (1)–(3) it is then concluded that land should be returned to Aboriginal people and wherever that should prove to be impossible other forms of redress have to be sought. It turns out that the situation is not as simple as it might seem; all three premises can be, and in fact have been, challenged. This paper will discuss challenges to premises (1) and (3) and argue that while the Australian Aboriginals should be considered the proper owners of at least parts of the Australian continent at the time of first contact, it does not necessarily follow that this leads to any claim rights to land today.

This paper will proceed in three steps. Firstly, a classification of property rights theories will be presented, arguing that the most common type of property rights theories, namely historic entitlement

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theories, are not theoretically viable and that from a theoretical perspective, interest theories of property rights have to be preferred. Secondly, the question of whether the Indigenous Australians should be considered the proper owners of the land prior to first contact will be debated in the light of two different types of property rights theories, namely historic entitlement theories and interest theories. It will be argued that no matter which theory is applied, Aboriginal Australians have to be considered the proprietors of the land prior to first contact. In a third step, it will be argued that even though Indigenous Australians held the property rights in the past this does not necessarily lead to any current claim rights to land, regardless of the type of theory that is applied.

## A CLASSIFICATION OF PROPERTY RIGHTS THEORIES

In order to discuss *moral* property rights in a particular situation, a short theoretical excursion is required for clarification. For this purpose it is helpful to categorise property rights theories according to the origin of what it is that justifies one person or a group of persons holding a property right and thus placing other people under some duties. Therefore in the following sections two of the most prominent classes of property rights theories will be discussed in some detail. These two approaches are not necessarily the only ways to justify property rights, however, they are the most important. Historic entitlement theories shall be considered because they have a long tradition, resonate well with our everyday intuitions in relation to property rights and form the basis of legal property rights. The other class of property theories that will be discussed are interest theories. It should be noted that for the purpose of this paper utilitarian justifications of property rights shall be subsumed under the heading of interest theories. This is because utilitarian deliberations are based on the “greatest happiness” or “greatest felicity” principle. In this paper this shall be regarded as close enough to the considerations that have to be made when deciding whether a person’s well-being (their interest) should be deemed sufficient to hold some other person(s) under a duty, as is the case in Joseph Raz’s interest theory discussed below.

### HISTORIC ENTITLEMENT THEORIES

Probably the most widely known class of theories of property rights is that based on historic entitlements, most notably the theories by John Locke,<sup>1</sup> and more recently Robert Nozick.<sup>2</sup> According to this type of theory, to decide whether somebody rightfully owns something, one only needs to look at the history of the thing in question and has to inquire as to whether property in it has been legitimately acquired. In most cases this will result in some particular thing X to be handed from rightful owner to rightful owner by means of legitimate transfers. However, it is quite obvious that if this chain of rightful owners is followed far enough into the past, at some stage an end will be found. The question that then has to be asked is how first ownership came about and whether that original appropriation was just. In relation to land rights, the interesting question is therefore one of *original appropriation*. It should also be noted that two assumptions underlie those theories. These assumptions are that (1) at some point in the past objects were unowned, and that (2) there exist unilateral acts of original appropriation whereby persons can acquire legitimate property rights in those previously unowned objects.

Through these unilateral acts of original appropriation two things are said to be delivered. The first is individuation. If the act of original appropriation and all following transfers were legitimate, it is quite clear why a particular object X should belong to some particular person P: P was the first to acquire property rights in X which was previously unowned, meaning that where previously nobody

1. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, Massachusetts: Harvard University Press, 1960).

2. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), part II.

had any claims over X, now P has legitimate claims. The standard example for this type of first acquisition would be an apple that grows on a tree that nobody has any claims to. The first person to pick any particular apple from the tree acquires property rights in this apple and is free to eat the apple without infringing on anybody else's rights. According to original appropriation theories it is the act of picking any particular apple that explains why that apple belongs to some person but not all the other apples that still remain on the tree.

The second thing claimed to be delivered is *moral* justification of the property rights in X. The exact form of what is actually doing the *moral* work to make something legitimately owned might differ from theory to theory, where John Locke's theory of mixing one's labour with an unowned object to ground property rights over that object is probably the best known example. Nevertheless, some justificatory element has to be found in every theory of property rights. After all, by acquiring property rights in an object, duties towards the new owner are bestowed upon everybody else, such as a duty not to take the object away from the owner without consent. This gaining of duties is a loss of liberties that people previously had and this loss of liberties needs to be justified.

One particular type of original appropriation theory that should be mentioned is *first occupancy* theory. In this particular theory the simple fact that someone happens to be the first to take an unowned object is doing the moral work of bestowing ownership of that particular thing upon that person. Bas van der Vossen<sup>3</sup> correctly points out that this theory resonates very well with our common sense as we know this type of appropriation from daily life. If we take a parking spot or the last seat on a bus we acquire the rights to use those spots simply because we happened to be the first ones to occupy them. Obviously, the analogy between those cases and genuine property rights only carries so far, given that we do not actually own the spot on the bus or the parking spot, that those were not unowned in the relevant sense, etc. Nevertheless, the thought is intuitively appealing. 'Take land for example. Here is this vast, uninhabited piece of land. Perhaps I can gain possession over some piece of it by being the first who decides to live there?'<sup>4</sup> Yet first occupancy is not the only type of original appropriation theory. Other theories of that type hold that simply being the first person to use something is not enough. Rather, according to those theories, a certain act of appropriation has to take place. This act could take many forms and various options have been suggested, but the important thing is that some act has to take place that does the moral work. Depending on the particular theory this act might have to be undertaken wilfully or could be something that was done without a conscious decision to appropriate.

A well known problem this class of theories suffers from is the problem that it is not clear how a unilateral act could bestow property rights on someone that lead to duties for someone else. One of the duties bestowed on other people, for example, would be the duty not to interfere with an owner's use of an object that is rightfully theirs, as long as that person is only using that object within the limits set by other people's rights. To use the words of Samuel von Pufendorf, 'We cannot apprehend how a bare corporal Act, such as seizure is, should be able to prejudice the Right and Powers of others, unless their consent be added to confirm it.'<sup>5</sup> One particularly puzzling point in this respect is how it is possible that a unilateral action can set limits to the actions of people not even born. If the example of the apples is considered again, it is easy to see that P's taking an apple now would not cause any problems to further generations as long as the apple tree is not affected, as there will be apples growing on that tree for years to come. That way later generations will still be able to enjoy apples even though P took one apple in the past. In contrast, if the resource in question is limited, the first people to appropriate will set the standards for generations to come. If one thinks of land, for example, once all of the available land has been divided up, there is no remaining land to be appropriated in later generations and therefore the actions of P in the past will limit the options of people in the present. Considering the immense

3. Bas van der Vossen, "What Counts as Original Appropriation?," *Politics, Philosophy and Economics* 8 (2009).

4. *Ibid.*, 358.

5. Samuel von Pufendorf cited in van der Vossen, "What counts as original appropriation?": 359.

growth of our population, this raises the question of how current generations can be bound by rights that stem from unilateral actions in the past long before they or even their parents were born. In fact, these problems are considered so severe that the mainstream position amongst moral philosophers today is that it is impossible to unilaterally appropriate at all. One way for the proponent of historical entitlement theories to deal with these problems is via what has come to be known as a 'Lockean proviso.' What the proviso demands is, to use Locke's words, that there be 'enough and as good left for others'<sup>6</sup> when appropriating finite goods. This is to make sure that the situation of others is not worsened through unilateral acts of appropriation. It can be argued, however, that the more seriously an historic entitlement theory takes the proviso to deal with the claims of the non-proprietary, the more it will have to rely on property as a practice within a wider theory of justice. For the purpose of this paper it can therefore be said that the more serious an historic entitlement theory takes the proviso, the more it will converge towards interest theories.

#### *INTEREST THEORIES OF PROPERTY RIGHTS*

A second class of property rights theories is based on individual or group interests. Amongst these, Joseph Raz's interest theory is probably the best known. According to his account of rights, "X has a right" if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.<sup>7</sup> In terms of property rights what this means is that an individual or a group can hold property rights over some piece of land, given that some aspect of their well-being depends on them having those property rights, and that this particular aspect of their well-being is deemed sufficiently important to hold other person(s) under the duty to respect these property rights. Considering Indigenous peoples, the fact that would do the *moral* work in justifying a peoples' claim to a certain piece of land would therefore not be that they simply happened to live in a given place first but that their well-being and style of living depended on it. Their particular style of hunting or food gathering might be dependent on a certain type of landscape that this group adjusted their lifestyle to over thousands of years. Should these people be forced to move, their whole subsistence might be in danger, certainly a reason sufficiently important to respect any property rights of theirs.

What makes this class of theories appealing is that there is a good rationale to do the moral work in justifying property. It is quite easy to see why property should be respected if it is the case that an important aspect of a person's or group's interests is linked to having a particular property right. Furthermore, this class of theories allow for dynamic adjustment of property with changing circumstances. What is at some time a justified distribution of finite goods might not be a justified distribution at some later time when circumstances have changed, be it that the environment has changed dramatically or that the population has increased vastly.

Imagine a situation in which a person or group P living in a forest with a certain endemic type of animal claims possession over certain parts of the forest just about large enough to support the livelihood of P. In a situation of plenty, where other persons and groups Q can find enough space to support their livelihood, it seems reasonable to assume that P is free to appropriate the area it is using without asking other people's permission and it seems reasonable to assume that P is free to exclude other people from the use of their hunting grounds.<sup>8</sup> After all, Q is capable of finding its own hunting grounds without having to rely on the use of P's. Now, if it was the case that the appropriation of land by P was just and that historic entitlement theories are correct, then P would be justified in claiming the same exclusionary

6. Locke, *Two Treatises of Government*, second treatise, section 27.

7. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 166.

8. This example is loosely modelled on an example in Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103 (1992): 24–25.

use of those lands even after a dramatic change of circumstances, say that an ecological disaster made the rest of the forest uninhabitable. For historic entitlement theories this can only mean one of two things. Firstly, if somebody argues for a weak entitlement theory, that is an historic entitlement theory that does include a Lockean proviso, then the change of circumstances based on people's well-being (interests) has to be taken into account overriding the historic entitlements, leaving us with a mixed theory of historic entitlements and interests. This is in fact the position of Locke<sup>9</sup> and Nozick,<sup>10</sup> indicating that both their theories are not pure historic entitlement theories. Secondly, if someone were to argue for a strong historic entitlement theory, that is, a theory that denies the existence of a Lockean proviso,<sup>11</sup> then all that matters is that P came by their property rights in a legitimate fashion, independent of any change in circumstances. If, on the other hand, interest theories are correct then while P initially held legitimate property rights over the land, the situation might have changed enough to annul these property rights because of vital interests by Q to share what was previously P's alone.

## AUSTRALIA: TERRA NULLIUS?

When Australia was first settled, the presumption on part of the English settlers was that the continent could be settled by white men because the land was not owned by anyone previously. This position has come to be known as *terra nullius*. *Terra nullius* (Latin for 'land of none') holds that the continent of Australia was unowned before the arrival of European settlers and hence was free for settlement. But, one might ask, how is it possible that the land was deemed unowned when there were clearly people living on it? After all, the first fleet made contact with Aboriginal people closely following its arrival in Botany Bay. The reason the land was thought of as unowned was that Australian Aboriginal people were thought to still be in a state of nature where the transition to actual land ownership had not yet happened, or in other words, the Indigenous people were said not to possess a sense of landownership and therefore did not possess any property rights in the lands they inhabited. In the eyes of the early settlers the Indigenous people of Australia were the *inhabitants* of the land not its *proprietors*. As Stuart Banner explains the reasoning of the settlers:

The "state of nature," as Europeans understood it, was a state in which humans had not yet appropriated land as property. Property in land required a minimum degree of social organization, of civilization, of law – property in land required a society to take the first steps to remove itself from the state of nature. All human societies had begun in the state of nature, but most of them had progressed since then, and one of the ways in which they had progressed was by assigning property rights in land. If the Aborigines were still in the state of nature, then by definition they did not own their land. The land was *terra nullius*.<sup>12</sup>

This thought was heavily influenced by John Locke's theory of property which needed a wilful act of appropriation, usually connected with agricultural use of land in a European sense<sup>13</sup> – a use the European new arrivals did not see in the way the Aboriginal people used the land. Obviously, if one believes in first occupancy theory this would not matter and Australia would by no means count as *terra nullius*. Aboriginal people were there first, and if being the first to settle somewhere decides property rights, then clearly the Europeans were mistaken in believing that Australia was the *land of none*. Yet, if a wilful act of appropriation was needed, be it in the form of 'mixing one's labour' or 'improving on the

9. Locke, *Two Treatises of Government*, Second Treatise, Sections 25 and 35.

10. Nozick, *Anarchy, State and Utopia*, 178–182.

11. For one such approach see Edward Feser, "There is No Such Thing as an Unjust Initial Acquisition," *Social Philosophy and Policy* 22 (2005): 56–80.

12. Stuart Banner, "Why Terra Nullius? Anthropology and Property Law in Early Australia," *Law and History Review* 23 (2005): 110.

13. It should be noted though that Locke himself thought of people as having genuine property rights even in a state of nature, a point where he separated himself from prior theories, such as Hobbes's, which thought of property rights as nonsensical without a form of government to guarantee them.

land,' then the original inhabitants of the Australian continent might be viewed as just that: *inhabitants*, not *proprietors*.

It has to be noted though (and Banner also points this out) that even at the time of early European settlement of Australia there were doubts as to the premise that Australian Indigenous people had not assigned property rights in land, might it be as private property or as communal property.<sup>14</sup> Today the generally held view seems to be that the premise of Australian Indigenous people not having a sense of landownership is false. At least, that is what a six member majority of the High Court of Australia decided in its decision on *Mabo and Others v State of Queensland (No 2)*.<sup>15</sup>

Yet, there is still an objection to be raised, even if we were to assume that *first occupancy* would decide who owns which parts of Australia. This objection would be concerned with the actual individuation and also the scope of landownership. After all, first occupancy is notoriously underdetermined. If someone were to occupy some land and build a home there and use other parts of the land to hunt, would they only have appropriated those pieces of land that their feet actually touched? And if not, how much more could they claim? What about the land that they used to travel from their home to the hunting grounds? Another question that has to be asked in that case is whether or not they would lose their property rights if they decided to move someplace else. Would the land still remain theirs or would it be returned to the pool of unowned land that can now be appropriated by someone else who chooses to live there? Also, it has to be asked how much a single person or one group of people can own by this method.<sup>16</sup> To quote van der Vossen: 'Surely no one believes that if I somehow succeed in putting a fence around the entire piece of uninhabited land, I thereby gain a property right over all that land.'<sup>17</sup> Especially in the case of Australia this seems to be quite a strong argument if first occupancy was the sole determinant of property rights. After all, according to current estimates the number of Indigenous Australians prior to contact with European settlers was between 1,000,000 and 1,500,000 people.<sup>18</sup> Keeping in mind that the landmass of the Australian continent is approximately 7,600,000 km<sup>2</sup>, that leaves a population density of no more than 0.2 inhabitants per km<sup>2</sup> or, in other words, five square kilometers for every person living on the continent. Even when we take into account that a lot of that landmass is not suitable for habitation we are left with a population density that is very low, and one might rightfully ask whether it is possible for a few people to own that large amount of land. Nevertheless, Australian Aboriginal people clearly were the first to settle the continent and therefore have claims to at least parts of it based on first occupancy.

Keeping in mind all the theoretical and practical problems with first occupancy, it does not seem to be the best of theories on which to base any property rights in land. What then about other original appropriation type theories? If it were to be the case that those theories are right, then it would be highly dependent on the actual act of appropriation that the specific theory requires to decide on whether the Indigenous people of Australia had any claims to land they inhabited which they could bring to bear against the European settlers. This might not only depend on the particular original appropriation theory but also on the specific group of Indigenous people in question, as one group might have undertaken these acts while another group might not. At least for some groups of Torres Strait Island people the High Court of Australia clearly thought that it was the case that the necessary acts of appropriation had been taken, as is evident from *Mabo*, yet it might be possible that others had not. Therefore, it might be right that the early settlers were right in claiming that the original inhabitants of the Australian continent were just that: *inhabitants* not *proprietors*. Does it follow from this assumption that they had no claims to the land and that the land was therefore free to be taken by white settlers? There are

14. Banner, "Why Terra Nullius?," 113–123.

15. *Mabo and Others v State of Queensland (No 2)* (1992) 107 ALR 1 (*Mabo*).

16. For more detail and additional criticisms, see Lawrence Becker, *Property Rights: Philosophical Foundations* (London: Routledge and Kegan Paul, 1977), chapter 3.

17. van der Vossen, "What Counts as Original Appropriation?," 359.

18. Banner, "Why Terra Nullius?," 113.

good reasons to believe that this is not the case. As mentioned above, most original appropriation-type theories come with what is now known as a Lockean proviso, and what this proviso demands is that by appropriating previously-unowned land the appropriating party has to make sure that other parties involved are no worse off than they would be without the act of appropriation. Hence Locke's famous dictum that there be 'enough and as good left for others.' Therefore, to legitimately acquire property rights one might still need to rely on property as a practice in the context of a wider theory of justice. Seeing that the Aboriginal tribes inhabiting a certain area were highly adapted to and, therefore, very reliant on the particular environment they were living in, it seems unfair on view of any decent theory of justice to put their lifestyle, and, more importantly, their means of subsistence in danger. This would be independent of whether or not they properly appropriated the land they were living on or not. It would also violate the Lockean proviso, as from an Indigenous point of view there was by no means 'enough, and as good' left for them. Therefore, if original appropriation theories are the correct way of justifying property rights, the Aboriginal people of Australia should either be considered the proper proprietors of the land or at least it should be concluded that an appropriation of the land by white settlers was unjustified.

As mentioned earlier the consensus among moral philosophers nowadays seems to be that original appropriation theories suffer from too many theoretical problems to be considered a valid option to ground property rights, no matter how well they resonate with our common sense feelings as to what should ground property rights. Therefore, interest theories have to be considered in respect to Indigenous land ownership at the time of first European settlement.

Before the time of first contact, Australian Indigenous people had a highly adapted lifestyle, which developed over thousands of years and made good use of the natural resources found in their environment. Like all hunter gatherer societies they developed methods for hunting adjusted to the type of prey they could hope to find in their environment. They also developed a knowledge about edible plants and herbal medicines which was precisely fitted to the environment they lived in. Given that it seems that there was little trade going on amongst different Aboriginal tribes or between Aboriginals and other peoples, Australian people had to be self-reliant and needed to get everything necessary for self-preservation out of their immediate surroundings. Therefore, it seems fair to assume that they had a vital interest to live in those areas, since their lifestyle and means of subsistence were dependent on a very specific environment. This interest should certainly count as sufficient to hold white settlers under a duty not to interfere with their property rights, since the new arrivals had other options as opposed to the Indigenous population that had nowhere to go.

In conclusion to this section, the answer to the question as to whether the Australian continent at the time of first white settlement could have been considered *terra nullius* has to be answered with a clear 'no.' Regardless of what class of property rights theory is applied to the situation, the outcome is always the same; that Australian Aboriginal people have to be considered the proper proprietors of at least parts of the Australian continent. In the case of first occupancy it has to be stated that Australian Indigenous people clearly were the first to settle the place. Should one favour another type of original appropriation theory, it would depend on the exact form of that theory but it seems in most cases that the Indigenous people had undertaken the necessary acts of appropriation and even if they had not, the taking of the land by European settlers would have violated any Lockean proviso intrinsic to these theories. Should, on the other hand, one follow what seems to be consensus among most moral philosophers today, and adopt an interest theory of property rights, it seems as though the Aboriginal people's interests in having property rights over parts of the continent are vital enough to hold the newly-arrived Europeans to some duties not to interfere with those rights.

## PAST PROPERTY AS REASON FOR LAND RIGHTS TODAY?

### *PRACTICAL PROBLEMS IN BASING CURRENT PROPERTY CLAIMS ON PAST ENTITLEMENTS*

The previous section came to the conclusion that at the time of first contact between European settlers and Indigenous Australians, the Australian continent or at least parts thereof have to be considered the property of the Indigenous peoples of Australia. However, does it then follow that Indigenous Australians today should have claim rights to those lands taken by European settlers over a hundred years ago? In other words, can we base current property claims on those past entitlements that were violated?

Thinking about historic entitlement theories, all that counts is that a thing X has been transferred from person to person and from generation to generation in a legitimate manner. Once someone has property rights in X she can do almost as she pleases (within the bounds of other people's rights not to be harmed) including the destruction of X. One of the more important rights she has is the right to transfer property rights of X, might it be as a gift or a bequest. This right only belongs to the legitimate owner of an object. Therefore, once the legitimate chain of transfers has been broken, it is impossible for any person that has come into possession of an object in an illegitimate manner to transfer that object in a legitimate way. Following this reasoning, it seems that it should be the case that current claims can be based on past entitlements.

Yet, when we look at the situation that people find themselves in when it comes to claims based on past entitlements, there are very different moral intuitions as to whether or not land rights should be renegotiated to meet claims by descendants of past owners. When considering the Americas and Australia, many people support the claims of Indigenous groups to land rights, having a feeling that those lands have to be 'returned' to what they perceive as the rightful owners. On the other hand, when we think of other instances where current claims might be based on past entitlements, such as Europe for example, most people would think of the same claims as absurd. When we think about the situation in Europe, like in many other places that have been settled for a long time, we find that barely any group of people can lay claims to the lands they now inhabit. In the times of barbarian migration, for example, whole groups of people were forced to migrate and leave their lands to be settled by some other group. According to historic entitlement theories this would have been an illegitimate act and the new settlers could therefore never have established legitimate claims over the lands they now inhabited, no matter how long they have been there. As a result, we would have to think that British people with Norman descent would have to give up their land claims over current Britain and return to their "native" Normandy. After all, William, Duke of Normandy, also known as "the Conqueror," took the land by force, something we would find illegitimate if done today. Now, most people would find this result incongruous, but there are only two options: either historic entitlement theories have to allow legitimate acquisition of land rights after a certain time period has elapsed even if the way they were originally acquired was illegitimate, or claims have to be followed back to breaks in legitimate ownership and the land in question will have to be thought of as not legitimately owned from then on. Given the long history of landownership by humankind, it seems unwise, to say the least, not to allow for those changes over time. Otherwise, ownership claims would have to be followed back thousands of years. The result of this would be hard to foresee but it would certainly lead to uncertainty about almost any currently existing land claims.

Even if someone were to accept that result, namely that all current land claims will have to be re-evaluated based on first ownership, they would run into the practical problem of identifying the actual first owners. Often when speaking about land rights for Indigenous people, it seems to be forgotten that Indigenous people are not one homogeneous group, but are made up of many different subgroups. For example, according to current research, more than 400 different peoples have been identified in



Australia.<sup>19</sup> It is an epistemic problem that will be impossible to solve, to work out which group had actual first possession over a certain area. After all, there is no reason to believe that over the possible 100,000 years of settlement of the Australian continent there was no competition between the different Indigenous peoples. But to possess any claim rights to land according to historic entitlement theories, it is not sufficient that a particular tribe would have inhabited the area at the time of first contact. What would be necessary for claim rights is original appropriation or a legitimate transfer of property rights of some form or else the Indigenous group in question would never have gained those rights, even when actually living there at the time of first European settlement.

While the above-mentioned problem will probably never be resolved, it is not to say that a group inhabiting an area during the time of first contact is not in fact the proper proprietor of the land. Should the burden of proof then lie with the European settlers and their descendants, since they should not have taken land without being sure that the taking was legitimate? In this case there is another problem which will be even more difficult to solve; the question of who to give the land to today if it were to be "returned."

Suppose one wanted to restore the property to its rightful owner to end the violation of their property rights. If the person whose rights were violated was still alive, then the right way of dealing with the problem would be via direct restitution to the person whose rights have been violated. But individuals are mortal, and when discussing land rights for Indigenous people redress has to be made to descendants of those people that had their property rights violated. To follow a line of thought that was developed by Jeremy Waldron,<sup>20</sup> what is of vital importance now is whether we are able to identify the correct rights-bearers in order to restore the property rights. Is a tribe of descendants of the original property owners now the same entity as the tribe that had its property rights violated at the time of white settlement?<sup>21</sup> To decide this it would be necessary to ensure that the two are not only the same in name but that they are identical in a sense relevant to questions of justice. Unfortunately, I am not aware of any work on what it means for a group (e.g., a tribe) to remain the same entity over several generations, or what requirements would have to be fulfilled to count as 'the same' in a meaningful way. However, the following should be considered.

What does it require for a group, such as a tribe or a family, to remain the same entity over time? The problem can be seen as reminiscent of the story of the fishing boat. Imagine a fisherman who goes out fishing every day and every time he comes back has to repair his boat and replace some of its planks. Surely, we would think of the boat as being the same after only some of the planks have been replaced. Over the years he happens to have replaced every single plank of his boat. Is the boat he is using now still the same boat he used when he first started out fishing? After all, all the constituent parts of the boat have, one by one, been replaced. Or to make the story even more intriguing, imagine the fisherman has kept all the old planks. Once he has replaced every single one he realises that he could use the old parts to build a new boat. Which of the two boats should now be considered the original fishing boat? Or can neither of them be considered the same entity as the boat that he used when he started out as a fisherman? It is an intriguing theoretical problem to think about what it means for a group to remain the same over many generations when all the people who are members of the group now are different individuals from the ones that were members of the group then.

19. David Horton, *The Encyclopaedia of Aboriginal Australia: Aboriginal and Torres Strait Islander History, Society, and Culture* (Canberra: Aboriginal Studies Press, 1994).

20. Jeremy Waldron, "Redressing Historic Injustices," *The University of Toronto Law Journal* 52 (2002): 146-150.

21. It is assumed here that Indigenous tribes had a system of collective ownership rather than individual property assignment at least in relation to land. This assumption seems reasonable in light of the nature of today's land claims by Indigenous organisations. For simplicity, the assumption will be made that the transition from individual to collective property rights does not pose a significant problem. For details on some of the problems connected to collective land ownership see Tamar Meisels, "Territorial Rights," *Law and Philosophy Library* 72 (2009), chapter 2.

In the decision for the Mabo case, Judge Brennan used the criteria of descent, identification with the group and a physical link to the land to establish a claim. He describes the situation at time of first contact and today as follows:

The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. Although outsiders, relatively few in number, have lived on the Murray Islands from time to time and worked as missionaries, government officials, or fishermen, there has not been a permanent immigrant population. Anthropological records and research show that the present inhabitants of the Islands are descended from the people described in early European reports. The component of foreign ancestry among the present population is small compared with most communities living in the Torres Strait. The Meriam people of today retain a strong sense of affiliation with their forbears and with the society and culture of earlier times. They have a strong sense of identity with their Islands.<sup>22</sup>

This is consistent with the precedence set in the Tasmanian Dam Case where an Aboriginal or Torres Strait Islander is defined as ‘a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives.’<sup>23</sup> While this shows consistency in adjudication it does not answer the question whether these are useful criteria when it comes to the question as to whether or not a group can still be counted as the same entity especially over long periods of time.

Usually, we consider a family the same if people living now can show their descent from certain people in the past. This is, for example, how family names get handed down. It is because I am a descendant of my parents that I should inherit the family name and possibly, after their passing, the family home. A problem with this, however, is that it can lead to clashes between individual and group claims. If a person nowadays is descendant of an Indigenous group but not a member of that group any longer, e.g., because she adopted an urbanised lifestyle, descent would still grant her some rights to the property of her ancestors. If descent is a useful criterion then the question of group membership does seem to become subordinate. While this does not have to lead to a clash between individual and group rights, it could. Waldron describes a case from New Zealand, where representatives of urbanised Māori became involved in a dispute about fishing rights. Fishing rights were seen to be a matter involving only traditional tribes, leaving those who are of Māori descent but who have lost their links to the tribal way of life without any redress.<sup>24</sup>

The criterion of identification with the group is also a problematic one. It was already described above how claims could be established from descent, but then why would identification with the group matter? If I have certain rights vested in me by right of birth, why would it matter whether I still consider myself a part of that group or not? If a descendant of one of the leading Nazi party members would renounce his ties to his family based on the atrocities committed by his father, would he lose any claims to family property that might have been handed down for generations before the Third Reich’s existence, even though he might not want any part of unrightfully gained riches from the time of the Third Reich? Another problem with self-identification as a group member is that obviously in and by itself it is not very useful at all. Even if I would consider myself a member of the British royal family nobody in their right minds would conclude that I therefore should have any rights that usually come with being a member of that family. And if we allow acceptance as a group member by others as a criterion we open them up to arbitrary acts by the group which might deprive them of rights.

Lastly, when it comes to the criterion of retaining a physical link to the land, it might be pointed out that if some group is forcibly removed from a certain area and therefore unable to retain this physical link it seems unfair to demand that link to retain their property rights. After all, being removed from the land and being unable to have that intimate relationship to the land any more is part of the initial injustice.

22. *Mabo and Others v State of Queensland*.

23. *The Commonwealth of Australia v Tasmania*. The Tasmanian Dam Case (1983) 158 CLR 1.

24. Waldron, “Redressing Historic Injustices,” 149–150.

While not discussing the problems connected to the criteria above, Waldron offers another criterion which is the functionality of a group, such as socio-economic need fulfilment for example, to identify whether a group should still be considered the same entity in a meaningful way. He presents a hypothetical story where a group  $G_m$  at a certain time  $m$  provides for its members' needs and is through some injustice deprived of most of its wealth. At some later time  $n$ , the members of the Group, now  $G_n$  in a society with a social safety-net, demand reparation for the injustice. He goes on to ask whether ' $G_n$  is identical in the relevant sense to  $G_m$ '<sup>25</sup> since the role  $G_n$  plays in the lives of its members is different to that played by  $G_m$ , and  $G_n$  might therefore be considered a different entity. In particular the fact that the injustice makes reference to responsibilities that  $G_m$  had which nowadays  $G_n$  does not share might shed doubt on the identity assumption. If this is a useful criterion, then it is not clear that the descendants of those Indigenous people that had their property rights violated would still have to be counted as the same entity, since there is now a state with a social safety-net that would have taken over many of the functions previously fulfilled by the tribe.

As a last consideration in this section, it might be asked whether the rights violation is still as serious now as it would have been then and whether it is still a deprivation that is suffered. Waldron offers an example in which he asks whether one would seriously want to say that the oldest surviving English aristocratic family, the Delaceys, are still suffering from a rights violation that happened in 1086. In that year the first Baron Delacey was supposedly deprived of his place at the King's Great Council. Are we sure that the modern Delacey family survives as the entity that still suffers this deprivation?<sup>26</sup> Again it is not clear whether this constitutes a useful criterion, but if it is, then it is not certain that tribes today would have to be viewed as the same entities as they were back then.

#### *SUPERSESSION OF CLAIMS DUE TO CHANGED CIRCUMSTANCES?*

In the last section it was argued that historic entitlement theories are not only theoretically unstable, but also face very practical challenges which shed doubt on the claim that current claim rights can be based on past entitlements. In this section it will be asked whether interest theories would lead us to believe that current claims can be defended. As mentioned above, the existence of an important aspect of a person's/group's well-being has to depend on having a property right, and this aspect of someone's well-being has to be important enough to hold other people under a duty to respect those rights. Is this the case for the Aboriginal population of current day Australia?

It was suggested that the reason for Aboriginal Australians to be considered the proprietors of the land they inhabited is found in them relying on the land for their subsistence. This would have changed over the years with urbanised lifestyles replacing a nomadic hunter gatherer lifestyle, a state which is providing a social safety-net and an introduced Western way of life with private property and jobs to provide income within a wider economy. It is therefore possible that interest in the return of the land is not sufficient to justify a change of the *status quo*. On the other hand, not only the socio-economic function should be considered but also the cultural and religious importance that Aboriginal Australians assign to the land. The discussion of whether or not this will be enough to establish claim rights is beyond the scope of this paper, but in this context, a *native title* that allows the use of certain areas without the establishment of full property rights might be viewed as a viable alternative solution. While it is possible that historic claims have been superseded,<sup>27</sup> more research is needed to decide whether this should be considered the case in the question of Indigenous land claims.

25. Ibid., 148.

26. Ibid.

27. Ibid., 4–28.

## A CURRENT CONTROVERSY ABOUT INDIGENOUS LAND RIGHTS

Currently there is a controversy about Indigenous land rights that is connected to the Queensland Labor government's 2005 "Wild Rivers" legislation. I would like to finish this paper by linking the theory discussed above to such a practical question of Queensland government policy.

It has been argued by some Indigenous leaders, especially Noel Pearson, that the law that declared some river systems in Queensland – among them the Lockhart, Archer and Stewart rivers in Far North Queensland – as pristine and wild river systems interferes with Aboriginal land rights to development of their own lands. It has been claimed that this law stifles economic development in Far North Queensland and takes away the right to decide about their property and its development from traditional owners. Yet the law does not interfere with uses that are sustainable.

To be perfectly clear, the "Wild Rivers" legislation does not ban Aborigines from trying to make a living out of their local environment. Despite some Indigenous claims to the contrary, grazing, ecotourism, fishing, mining, aquaculture, animal husbandry and extracting water for community use are all allowed, subject to certain conditions. There are no restrictions on Indigenous cultural activities.<sup>28</sup>

While some of the controversy might be put down as a lack of information about the actual rules or a political conflict, it could also be viewed on a deeper level as a conflict between strong historic entitlement theories and interest theories of property. One could view Pearson as subscribing to a strong entitlement theory that does not hold property owners, in this case the Indigenous groups of Far North Queensland, under any further obligations leaving them free to do with their property as they please. In this case any further considerations, for example regarding the sustainability of what they intend to do, would be unnecessary. If the situation is viewed in light of interest theories, however, then the situation becomes more complicated. In that case, the question would be whether a particular use would be a sufficient reason to hold some other person(s) under a duty not to interfere with the property rights, in this case a duty on the government not to interfere with the development of this property. While the handling of development applications has to be handled with a sense of proportion and without claiming that every aspect about the law is necessarily perfect, it seems that the approach by the Queensland Government is a reasonable one. In light of the theoretical and practical problems with historic entitlement theories, it seems better to use an interest-based approach that tries to balance the interests and rights of all those involved. This obviously means foremost that the Indigenous people living in the area who have a right to make a living and to sustainable development which might improve their economic and social situation, but this also means the wider Australian public which has an interest in preserving the environment for the future. This is also the official position of the Wilderness Society:

The Wilderness Society recognises the rights of Traditional Owners to the use and enjoyment of their lands and to negotiate on developments occurring on them. However, we believe that all landholders, Indigenous and non-Indigenous alike, need to accept sensible safeguards for the environment on their land for the benefit of all Australians. This doesn't mean stopping all development, but it does mean carefully regulating some of it, and preventing large scale destructive development in sensitive areas.<sup>29</sup>

In light of the theoretical approaches discussed above the approach by the Queensland Government and the Wilderness Society seems a more reasonable one than the one advocated by Mr. Pearson and it seems that stronger property rights for Indigenous groups in this case are not necessary.

28. Cosima Marriner, 2010, "The Murky Waters of Queensland's Wild Rivers," *National Times*, accessed 27 September 2010, <http://www.theage.com.au/opinion/politics/the-murky-waters-of-queenslands-wild-rivers-20100115-mama.html>.

29. The Wilderness Society (QLD) Inc., 2010, "Pearson Deceiving the Australian Community on Wild Rivers," accessed 27 September 2010, <http://www.wilderness.org.au/articles/pearson-deceiving-the-australian-community-on-wild-rivers>.

## CONCLUSION

In this paper it was argued that it is useful for the application of property right theories to classify them according to the origin of what it is that does the moral work in justifying property rights. In this discussion problems about the theoretical viability of historic entitlement theories have been shown, and interest theories have been suggested as a better option in terms of theoretical stability. Applied to the situation of white settlement in Australia it has been argued that no matter what theory is used, the continent or at least parts thereof have to be considered the property of the Indigenous Australians at the time of first contact. The taking of land by white settlers therefore has to be counted as an injustice that should be acknowledged today. In the discussion on modern claim rights based on this past injustice more research is required, but it has been shown that it is not straightforward to claim land rights based on the past entitlements of Indigenous Australians. There is a plethora of practical and theoretical problems that need more careful consideration than this paper has to offer. More research into group identity over generations and questions of supersession of property rights is therefore suggested.<sup>30</sup>

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